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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1726

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Petitioner,

vs.

GEORGE K. WYMAN, INDIVIDUALLY AND AS COMMISSIONER OF THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK, AND GEORGE BUGNACKI, EARL M. AUSLANDER, THOMAS GENTILE, ETC.,

Respondents,

JOHN L. LASCARIS, COMMISSIONER OF THE DEPARTMENT OF SOCIAL SERVICES OF ONONDAGA COUNTY, NEW YORK,

Appellant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, the Chamber of Commerce of the United States of America, prays that a writ of certiorari issue to review the decision and judgment of the Court of Appeals for the State of New York attached hereto as Appendix A, *infra*.

OPINION BELOW

The opinion of the New York Court of Appeals (Appendix A) is reported at 31 N. Y. 2d 386. A motion for reargument was denied on March 22, 1973 (Appendix B, *infra*) and a peti-

tion to vacate the order denying the motion for reargument was denied on May 4, 1973 (Appendix C, *infra*). The initial order of the New York Supreme Court, Motion Term, granting temporary injunctive relief, and the decision of that Court on the merits (68 N. Y. Misc. 523 (1971)) are set forth in Appendices D and E, *infra*, respectively. The decision of the New York Supreme Court, Appellate Division (8 N. Y. A. D. 2d 163 (1972)) is set forth in Appendix F, *infra*.

JURISDICTION

A timely motion for reargument was denied on May 4, 1973 (Appendix C), and this petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. 1257(3).

QUESTIONS PRESENTED

1. Does denial of party status to the only real party in interest, with a substantial economic stake in the outcome of the litigation and no alternative remedy, constitute a denial of due process under the Fourteenth Amendment of the Constitution?

2. Does the State grant of welfare assistance to strikers contravene federal labor policy by insulating one party—the striking union—from the economic disadvantages of a strike, and thus deviate from the State's required neutral position in collective bargaining?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV of the United States Constitution and Section 131 of the Social Services Law of the State of New York are set forth in Appendix G, *infra*.

STATEMENT OF THE CASE

This case was commenced as a declaratory judgment action by John L. Lascaris, the Commissioner of the Department of Social Services of Onondaga County, New York (hereafter "Lascaris"), against George K. Wyman, the Commissioner of the Department of Social Services of the State of New York (hereafter "Wyman"). The action arose out of a strike by employees of the New York Telephone Company represented by the Communication Workers of America, which commenced in July, 1971, and ultimately settled in February, 1972. Shortly after the strike commenced, Lascaris received applications from strikers for public assistance benefits under Section 131 of the New York Social Services Law, which applications were denied on the ground that strikers were ineligible thereunder. Lascaris commenced this action to confirm this determination against the contrary view taken by Wyman.

After the filing of the suit, the strikers intervened and moved to dismiss the complaint, a motion treated by all parties as being for summary judgment. The Supreme Court, Motion Term, found that Section 131 did not permit the payment of public assistance to strikers. 68 N. Y. Misc. 2d 523 (1971). Appendices D and E, *infra*. This decision was reversed by the Supreme Court, Appellate Division, which held that striking employees, otherwise qualified, were eligible to receive such benefits. 8 N. Y. A. D. 2d 163 (1972). Appendix F, *infra*. This determination was, in turn, affirmed by the New York Court of Appeals (31 N. Y. 2d 386 (1972)) which denied reargument on March 22, 1973.

The Chamber, which was permitted to appeal as *amicus curiae* but was denied the right to intervene in the Appellate Division, sought to intervene as a party in the Court of Appeals. The Court, on March 23, 1972, denied this motion, although it permitted the Chamber to file a brief and present a short oral

argument. During the oral argument, the Chamber renewed its motion to intervene. This motion was denied by the Court in its decision, notwithstanding that it also expressly rejected the contention, urged only by the Chamber, that the payment of such benefits constituted an unconstitutional infringement by the State on federal labor policy. Appendix A, *infra*, pp. A4-5, n. 4; A8-9.

Lascaris declined, subsequent to the Court of Appeals' decision, to pursue the matter further. Consequently, the Chamber then sought again to intervene, by means of a motion for reargument, in order to permit it, as the representative of the affected employers and the sole remaining advocate of its position, to have the right of further appeal. The motion for reargument was denied by the Court of Appeals on March 22, 1973 and a motion by the Chamber to vacate that denial, based on the intervening decision of the United States Court of Appeals for the First Circuit in *Grinnell Corporation* v. *Hackett*, 475 F. 2d 449 (March 15, 1973), *pet. cert. pend.*, No. 72-1212, was denied by the Court on May 4, 1973. Appendices B and C, *infra*.

REASONS FOR GRANTING THE WRIT

A. Introduction

The payment of government subsidies to striking employees, with its consequential debilitating effect upon collective bargaining, is a growing national problem.[1] The Chamber sought here to intervene as a party, as it has done successfully before federal courts in related cases,[2] in order to represent the economic in-

1. See Dr. Armand Thieblot and Ronald M. Cowin, *Welfare and Strikes*, University of Pennsylvania Press (Philadelphia, 1972). The issue is presently pending before this Court in two cases: *Grinnell Corporation* v. *Hackett*, No. 72-1212, and *Super Tire Engineering Company* v. *McCorkle*, No. 72-1554.

2. The Chamber has been granted party status, litigating the constitutional propriety of providing strikers with welfare or unem-

terests of its members adversely affected by such a subsidy, which Lascaris, following the decision of the Court of Appeals, expressly refused to defend. Moreover, the decision by the court below on the merits of the Chamber's position, while denying it the right to appeal that ruling, constitutes an independent violation of the Chamber's due process rights.

B. The Court of Appeals' Refusal to Permit Intervention Violated the Chamber's Due Process Rights Under the Fourteenth Amendment to the Constitution

Collective bargaining is a system of economic tension based on "the bargaining strengths of the parties." *H. K. Porter* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970). Paying welfare benefits to strikers significantly alters those relative bargaining strengths and necessarily results in higher contract settlements and/or longer strikes.[3]

This Court has recognized that such an alteration in economic competition is a legally cognizable injury which, if not

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ployment compensation assistance, before the United States District Courts for the Eastern District of Michigan (*The Dow Chemical Company and the Chamber of Commerce* v. *Taylor*, No. 38664); the District of Rhode Island (*Grinnell Corp.* v. *Hackett, et al.*, 344 F. Supp. 749, *rem'd.*, 475 F. 2d 449 (1st Cir. 1973)); and the Eastern District of New York (*Russo* v. *Kirby*, 335 F. Supp. 122, *rev'd.*, 453 F. 2d 548 (2nd Cir. 1971)). The Chamber, as the largest association of business and professional organizations in the United States, was the only party representing the management point of view before the New York courts. By contrast, various labor points of view were fully represented by both parties and an *amicus curiae*.

3. As Dr. Herbert Northrup, Director of Industrial Research Units of the Wharton School of Finance and Commerce, stated in as affidavit presented by the Chamber to the court below:

> "Faced with an inflationary situation in which workers on strike are being compensated and have therefore no urgent desires to return to work, the employer may, for example, decide it's better to give in early and give a large settlement rather than take a long strike. On the other hand, the employer may feel he is unable to meet these demands which he feels are exorbitant and hold out. But the strike lasts longer because the workers are supported by the tax funds."

protected adequately by the original parties, justifies intervention *as of right* by the aggrieved party. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129 (1969); *Missouri and Kansas Pipeline Co.* v. *United States*, 312 U. S. 502 (1941). In the *Cascade Natural Gas* case, which revolved about a divestiture pursuant to an antitrust settlement, the Court permitted a large industrial consumer, "desirous of retaining competition" (p. 132), to intervene because of its "interest, as part of the public interest in a competitive system." (p. 135). By the same token, in an oft-cited decision, one federal court of appeals reasoned that the competitive effect of minimum wage standards on unionized employers, although only applied to non-union employers, gives a union "a real economic stake" in defending such regulations. *Textile Workers* v. *Allendale Co.*, 226 F. 2d 765, 769 (D. C. Cir. 1955). Cf. *Nuesse* v. *Camp*, 385 F. 2d 694, 701 (D. C. Cir. 1967).

In the case at bar the effect on economic competition takes on two forms: (1) the subsidization of union members which either leads to higher labor costs or additional lost profits through prolonged strikes; and (2) the unfair disadvantage to New York employers who may be engaged in interstate competition with employers whose workers would not be state-subsidized during a strike. In either form, the stake is real and substantial; yet Lascaris refused to appeal the matter further following the decision below. The Chamber's motion to intervene, in these circumstances, was required to be granted as a matter of right. *Pepsico, Inc.* v. *F. T. C.*, 472 F. 2d 179 (2nd Cir. 1972). See, e.g., *Wolpe* v. *Poretsky*, 144 F. 2d 505 (D. C. Cir. 1944), *cert. den.* 323 U. S. 777 (1944). The failure to grant the motion constitutes a denial of due process. *Pepsico Inc.* v. *F. T. C.*, 472 F. 2d at 184. See also *New Orleans Water Works Co.* v. *New Orleans*, 164 U. S. 471, 480 (1896) (when ordinances which granted exclusive licenses were challenged and none of the licensees were before the Court, a decree "on its face would not be due process"); and *Western Union*

Company v. *Pennsylvania*, 368 U. S. 71, 75 (1961) (there can be "no doubt that the defendant has been denied due process" by a judgment unless the courts had power to protect it from other claims by adding the parties making such claims).

The above cases are applicable here. This Court has applied "relevant constitutional restraints" to the "withdrawal" of privileges. *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1963); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *Speiser* v. *Randall*, 357 U. S. 513 (1958). Here, the denial or grant of a privilege has a direct economic impact on other persons. The flexible principle of due process must take into account, in this situation, both "the precise nature of the government function involved as well as the private interest that has been affected by governmental action". *Goldberg* v. *Kelly*, 397 U. S. at 263. Consideration of these interests, it is submitted, warrants review by this Court of the instant case.

C. After Rejection of the Chamber's Substantive Position the Denial of Party Status to the Chamber Constituted a Violation of Due Process

The court below expressly addressed itself to the question of the conflict between New York welfare policy and federal labor policy, rejected the federal claim, but denied the Chamber, the only advocate of the federal position, the right to appeal. In so ruling against the Chamber, an authoritative precedent was set should other "proceedings" be instituted. Cf. *Textile Workers* v. *Allendale, supra; Nix* v. *Spector Freight Systems, Inc.*, 264 F. 2d 875 (3rd Cir. 1959).[4] The Chamber was thus

4. The decision below is particularly anomolous in view of *Russo* v. *Kirby, supra* n. 2, where the Second Circuit, in a case in which the Chamber participated as a party, held that strikers involved in the same labor dispute as gave rise to the instant case had no federal right to the welfare benefits here involved. The matter was thus left to the state courts for resolution. Now, however, by reason of the court's below refusal to permit intervention, the Chamber has been denied the right to obtain further review of the very State determination which it succeeded in

foreclosed from all avenues of relief in the State of New York. *Atlantis Development Corp.* v. *U. S.*, 379 F. 2d 818 (5th Cir. 1967). The decision below also denied the Chamber due process by precluding further appeal. An appeal, after all, has long been recognized as no more than a continuation of the original action. *Marbury* v. *Madison*, 1 Cranch Rep. 137, 175-176 (1803). The decision below, by denying the Chamber the right to intervene, has effectively denied the Chamber the right to obtain review of the erroneous disposition of its substantive position.[5] It has thus been denied "the fundamental requisite of due process of law . . . the opportunity to be heard". *Goldberg* v. *Kelly*, 397 U. S. at 267.

D. This Court Should Determine Whether State Welfare Assistance Improperly Infringes Upon the Federal Labor Policy of Free Collective Bargaining

The underlying issue in this case is whether State welfare assistance which subsidizes the striking union in a labor dispute unconstitutionally deviates from the neutral position required of the State by federal labor policy. Although this Court has declined to decide this question on other occasions, in view of the substantial litigation and dissension which has been engendered by the absence of a definitive determination, it is respectfully submitted that, should this Court find that

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obtaining in *Russo*. Ironically, if the Court of Appeals had reached a contrary result in *Russo*, the Chamber would have been entitled to obtain such review of the substantive question decided below.

5. The Chamber is not free to institute a new action in federal court, despite the *present* injury to its members, as a result of an anomoly to the doctrine of mootness. *Super Tire Engineering Company* v. *McCorkle*, *supra*, n. 1. The average strike lasts only twenty-seven days, hardly sufficient time for an exchange of pleadings. *Work Stoppages for 1971: Selected Final Tabulation:* Bureau of Labor Statistics, U. S. Dept. of Labor (G. P. O., June 1972), p. 1. Hence, when Lascaris refused to argue the Chamber's constitutional position, the Chamber had to intervene or be thereafter precluded, despite the continuing nature of its injury, from advancing its position.

the Court below erred in preventing the Chamber from intervening, the instant case should also be utilized to resolve this nationally significant problem. This issue is one of importance to every employer and employee whose industrial relations are governed by a collective bargaining agreement, as well as to those who must exercise the ". . . difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge* v. *Williams*, 397 U. S. 471, 487 (1970). It is, therefore, also a question which warrants this Court's attention.

CONCLUSION

For all the foregoing reasons, it is respectfully urged that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

STATE OF NEW YORK COURT OF APPEALS

170.

JOHN L. LASCARIS, Commissioner of the Department of Social Services of Onondaga County,

Plaintiff-Appellant,

against

GEORGE K. WYMAN, Individually and as Commissioner of the Department of Social Services of the State of New York,

Defendant-Respondent.

CHARLES BUGNACKI, EARL M. AUSLANDER, THMOAS GENTILE, etc.,

Defendants-Interveners-Respondents.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

FULD, *CH. J.:*

We are called upon to decide whether persons on strike may obtain public assistance if they are "unable to maintain themselves" within tthe sense of section 131 of the Social Services Law and otherwise comply with the provisions of that statute.

For over twenty years the Commissioner of Social Services of the State of New York, in administering section 131, has

provided such assistance.[1] Challenged in 1969 by the Commissioner of the Department for Social Services of Onondaga County (John L. Lascaris) on the ground that subdivisions 1 and 4 (of section 131) rendered striking workers ineligible for public assistance, the State Commissioner's administrative practice was accorded judicial approval. (*Lascaris* v. *Wyman*, 61 Misc. 2d 212, 215 [hereafter referred to as *Lascaris I*].)[2]

1. See, *infra*, p. 5, n. 5, as to administrative practice in other jurisdictions.

2. Subdivision 1 of section 131 of the Social Services Law provides:

> "1. It shall be the duty of social services officials, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves, in accordance with the requirements of this article and other provisions of this chapter. They shall, whenever possible, administer such care, treatment and service as may restore such persons to a condition of self-support or self-care, and shall further give such service to those liable to become destitute as may prevent the necessity of their becoming public charges."

Subdivision 4, originally enacted in 1959 (L. 1959, ch. 715), was amended in 1969 to read as follows (L. 1969, ch. 184, § 4):

> "4. No assistance or care shall be given to an *employable person who has* not registered with the nearest local employment agency of the department of labor or has *refused to accept employment in which he is able to engage.*
>
> "A person shall be deemed to have refused to accept such employment if he:
>
> "a. fails to obtain and file with the social services district at least semi-monthly a new certificate from the appropriate local employment office of the state department of labor stating that such employment office has no order for an opening in part-time, full-time, temporary or permanent employment in which the applicant is able to engage, or
>
> "b. willfully fails to report for an interview at an employment office with respect to employment when requested to do so by such office, or
>
> "c. willfully fails to report to such office the result of a referral to employment, or
>
> "d. willfully fails to report for employment. Such willful failures or refusals as above listed shall be reported immediately to the social services district by such employment office.
>
> *"This shall not apply to persons who cannot register with such employment agency because of age, health or other disability."* (Emphasis supplied.)

No appeal was taken from that decision. Subsequently, in 1971, the Legislature, unquestionably aware of the State Commissioner's long established administrative policy, passed an amendment to subdivision 4, elaborating upon the statute's definition of an "employable" person.[3] The question posed on this appeal, here as of right, is whether under subdivision 4, as amended in 1971, the State Commissioner may continue to make public assistance grants available to otherwise qualified persons on strike.

The present case, and the facts are substantially undisputed, stems from a strike, begun in the summer of 1971, by the Communication Workers of America against the New York Telephone Company and other employers. Although the national union soon reached a settlement with the employers, the locals in this State—Locals 1123, 1152, 1191 and 1197, constituting the Greater Syracuse Labor Council—refused to ratify it and continued to strike until February 1972. Shortly after commencement of the strike, certain members of these local unions —including Charles Bugnacki, Earl Auslander and Thomas Gentile—applied to the Onondaga County Department for Social Services for "public assistance." As required by sub-

3. The 1971 amendments (L. 1971, ch. 102) omitted the sentence beginning, "This shall not apply" (see fn. 2, *supra*), and added the following detailed definition of "employable" person:

> "For the purposes of [subd. 4], a person shall be deemed employable if such person is not rendered unable to work by: illness or significant and substantial incapacitation, either mental or physical, to the extent and of such duration that such illness or incapacitation prevents such person from performing services; advanced age; full-time attendance at school in the case of a minor, in accordance with provisions of this chapter; full-time, satisfactory participation in an approved program of vocational training or rehabilitation; the need of such person to provide full-time care for other members of such person's household who are wholly incapacitated, or who are children and for whom required care is not otherwise reasonably available notwithstanding diligent efforts by such person and the appropriate social services department to obtain others to provide such care. A person assigned to and participating in a public works project * * * shall be deemed employable but not employed."

division 4 of section 131, each of the three named persons "registered" with the nearest local employment agency of the department of labor. Their applications were denied.

As he had done in 1969, County Commissioner Lascaris brought an action in the Supreme Court against the State Commissioners in which he sought confirmation of his administrative determination denying the striking workers assistance. In his complaint, after setting forth the 1971 amendment to subdivision 4, the plaintiff alleged, among other matters, that "a striking employee renders himself ineligible for public assistance because of the nature of a strike [because] he is not available for full-time employment elsewhere and, therefore, limits his availability on the employment market."

Following the interposition of their answers—in which collateral estoppel and res judicata were pleaded in reliance on the 1969 *Lascaris I* decision (61 Misc. 2d 212, *supra*)—the defendants moved, pursuant to CPLR 3211(a)(5), to dismiss the complaint. The justice at Special Term, treating the motion as one for summary judgment, decided in favor of the plaintiff County Commissioner (68 Misc. 2d 523). It was his view that the 1971 amendment "eliminated strikers from entitlement to public assistance, no matter how justified their grievance." Upon appeal, the Appellate Division, in an opinion by Justice Cardamone, unanimously reversed, granted summary judgment in favor of the defendants and directed the plaintiff to make available and pay public assistance benefits to striking workers who were eligible therefore (38 A. D. 2d 163). That court declared that, (1) "immediately prior to the 1971 amendment to subdivision 4 * * * strikers were eligible to receive public assistance provided that they registered with the State employment office and did not refuse any new employment opportunities" and (2) "the amendment to subdivision 4 * * * does not affect their rights to receive welfare" (38 A. D. 2d, at pp. 167, 168).[4]

4. Permitted to intervene as defendants at Special Term were the applicants mentioned above, individually and on behalf of all

We agree with that conclusion. Subdivision 1 of section 131 of the Social Services Law expressly declares that "[i]t shall be the duty of social services officials, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves, in accordance with the requirements of this article and other provisions of this chapter. They shall, whenever possible, administer such care, treatment and service as may restore such persons to a condition of self-support or self-care, and shall further give such service to those liable to become destitute as may prevent the necessity of their becoming public charges." Subdivision 4 was added in 1959 (L. 1959, ch. 715) to recite that assistance shall not be given to "an employable person who has not registered with the nearest local employment agency of the department of labor or has refused to accept employment in which he is able to engage." As noted above (p. 2, n. 2, n. 3), it was amended in 1969 (L. 1969, ch. 184, § 4) and again in 1971 (L. 1971, ch. 102).

Under subdivision 4, as it read prior to 1971, it is manifest that a person on strike was an "employable person" and, by that token, ineligible for public assistance *only if* he failed to register with the appropriate employment agency or "refused to accept employment in which he was able to engage." Assuredly, no basis existed for excluding a striking worker from the reach of the statute on the ground that he could not register with such employment agency "because of age, health or other disability." It follows, therefore—as the Appellate Division and the court in *Lascaris I* (61 Misc. 2d 212, *supra*) decided—that the State Commissioner properly ruled that a person on strike

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those similarly situated, as well as the locals comprising the Greater Syracuse Labor Council. The union, the Communication Workers of America, has filed an amicus brief in our court, as it did below, in support of the position espoused by the defendant State Commissioner. Although we granted permission to the United States Chamber of Commerce to file an amicus brief supporting the stand taken by the plaintiff County Commissioner, the court denied its application—made on papers (30 N. Y. 2d 675) and renewed on oral argument—to intervene.

does not, simply because he is on strike, "refuse" to accept employment. It is worth noting that the only two courts outside of this State which have considered the problem have reached the same conclusion under statutes similar to our own. (See *Strato-O-Seal Mfg. Co.* v. *Scott*, 72 Ill. App. 2d 480, 485-486 [Ill. Rev. Stat. 1965, ch. 23, § 401 (now Ill. Rev. Stat. 1967, ch. 23, § 6-1.4)]; *ITT Lamp Division of Int. Telephone & T. Corp.* v. *Minter*, 435 F. 2d 989, 995, cert. den. 402 U. S. 933 [Mass. G. L., ch. 117, § 1B (now § 3)].)[5]

Quite obviously, the 1971 amendment of subdivision 4 of section 131 did not effect the critical determination that strikers do not "refuse" employment merely by going out on strike. On the contrary, that amendatory act simply listed those who were deemed "*un*employable" and thus beyond the reach of the statute altogether. In point of fact, the amendment may well be regarded as legislative approval of the construction long accorded section 131 by the State Commissioner. (See, e.g., 2 Sutherland, Statutes and Statutory Construction [3d ed. 1943], § 5109, pp. 525-526).

Nor may the payment of welfare benefits to needy strikers be regarded as the equivalent of state subsidization of the strike in violation of the State's policy of neutrality in labor-management disputes—as reflected by the Legislature's suspension of unemployment benefits for the first seven weeks of a "strike, lockout or other industrial controversies" (Labor Law, § 592, subd. 1; see, e.g., *Matter of Burger* [*Corsi*], 277 App. Div. 234, 236, affd. 303 N. Y. 654; *Matter of Heitzenrater* [*Hooker Chem. Corp.*], 19 N. Y. 2d 1, 7). It may fairly be said that in cases such as this the policy of governmental neutrality in labor controversies is, in reality, little more than admirable fiction. Although, on the one hand, the State may not be acting in a strictly neutral fashion if it allows strikers to obtain public

5. Moreover, it is of significance that upwards of 30 states make some sort of public assistance available to striking workers if they are in need and otherwise qualify under the applicable statutes. (See Note, 39 U. Chi. L. Rev. 79, 97 [n. 104], 101 [n. 132].)

assistance, it may not, on the other hand, be seriously maintained that the State adopts a neutral policy if it renders strikers helpless by denying them public assistance or welfare benefits to which they would otherwise be entitled.[6] Indeed, it seems manifest that public assistance serves a purpose quite different from—and, by that token, not in conflict with—that which underlies the State's policy of neutrality. As the court observed in *ITT Lamp Division of Int. Telephone & T. Corp.* v. *Minter* (435 F. 2d 989, 994, cert. den. 402 U. S. 933, *supra*)—which, as noted, upheld an administrative practice similar to the one here in question—"welfare programs, supplying unmet subsistence needs to families without time limitation, address a more basic social need than does unemployment compensation, which attempts to cushion the shock of seasonal, cyclical, or technological unemployment by making available time limited benefits to individual workers, varying in relation to their prior earnings and without reference to demonstrated need." In any event, in light of this State's long-standing administrative policy sanctioning assistance payments to strikers, the Legislature, if it considers such a policy impermissible, should manifest its design in clear and unmistakable terms. Until such time as it does, we construe the statute as it stands and has been administered.

The plaintiff, however, contends that a striking worker should be stamped as ineligible for assistance, since, it being likely that he will return to his "struck" employer at the conclusion of the strike, he has—in the words of the plaintiff—"in effect refused to accept any other employment." In support of this contention, he relies primarily on a 1972 "fair hearing" decision rendered (pursuant to section 353, subdivision 2, of the Social

6. "Where, as here," it has been said, "the employer's business interest is pitted against a destitute striker's need for food and shelter, the balance can only tip in favor of the striker. * * * The state can hardly be viewed as encouraging strikes by allowing those payments; the prospect of receiving a fraction of normal wages, after the exhaustion of all savings and other assets, would hardly seem an incentive to strike." (Note, Welfare Assistance to Strikers, 67 Nw. U. L. Rev. 245, 260.)

Services Law) by the defendant State Commissioner. (See *Matter of Darrow*, decision, dated Jan. 28, 1972; see, also, *Matter of Martinez*, decision of Commissioner of Social Services, dated Aug. 3, 1971.) Neither decision, it should be noted, had anything to do with workers on strike. In *Darrow* (*supra*), the applicant for assistance had actually asserted that he would accept the job offered but that he "intended to quit as soon as he heard from his former employer." On these facts, the State Commissioner, concluding that the employment interviewer correctly found that the applicant was "not interested in the job for which he was applying," affirmed the County Commissioner's determination that the applicant had "refused to accept employment in which he was able to engage." The short answer to the plaintiff's argument is that the applicants for assistance in the present case have—and this is conceded—registered for other employment ("part-time, full-time, temporary or permanent employment"), as required by subdivision 4, and there is no evidence whatever in the record that they have either failed to attend job "interviews" or refused "referrals" or that they have refused to accept an offer of such employment.[7]

The remaining contention—grounded upon the doctrine of pre-emption and urged upon us by the Amicus Chamber of Commerce—that granting public assistance to strikers constitutes "an unconstitutional interference with the system of free collective bargaining prescribed by the Federal Government," lacks substance. (See, e.g., *ITT Lamp Division of Int. Telephone & T. Corp.* v. *Minter*, 435 F. 2d 989, 994, cert. den. 402 U. S. 933, *supra*.) In the first place, it is not at all clear—there is no evidence in the record on the point—exactly what impact public assistance grants have on the system of collective bar-

7. We have no occasion here to consider whether an applicant on strike is entitled to public assistance if, although he diligently and in good faith satisfies the job-interview and the referral requirements, no employer will hire him even for part-time employment because of the belief that he may return to his old employer upon the termination of the strike.

gaining.[8] In the second place, the State's interest in providing welfare for its needy citizens is unquestionably a substantial one, and we will not assume that Congress has deprived, or intended to deprive, the State of the power to serve that interest where, as here, it chooses to provide assistance and care to workers rendered indigent by labor disputes, even if such aid has some impact on national labor policy. To so immobilize the State requires a clear expression of Congressional intent. (See *ITT Lamp Division of Int. Telephone & T. Corp.* v. *Minter*, 435 F. 2d 989, 994, cert. den. 402 U. S. 933, *supra; Grinnel* v. *Hackett*, 344 F. Supp. 749, 754, app. pending .... F. 2d .... [1st Cir. Nos. 1275-6]; see, also, *Francis* v. *Davidson*, 340 F. Supp. 351, 363, affd. sub nom. *Davidson* v. *Francis*, ... U. S. .... [41 USLW 3199, Oct. 17, 1972]; Note, Welfare for Strikers, 39 U. Chi. L. Rev. 79, 106-109; Note, Welfare Assistance to Strikers, Nw. U. L. Rev. 245, 251-254; cf. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243-244.)

The order appealed from should be affirmed, without costs.

* * * * *

Order affirmed, without costs. Opinion by FULD, *Ch. J.* All concur.

8. There is, of course, some impact, since public assistance does provide impoverished strikers subsistence level economic support for the length of the strike and thus somewhat eases the pain of a long strike. (See, generally, Note, Welfare for Strikers, 39 U. Chi. L. Rev. 79, 101-106; see, also, A. Thieblot & R. Cowin, Welfare and Strikers: The Use of Public Funds to Support Strikers [1972].)

APPENDIX B

DECISION COURT OF APPEALS

March 22, 1973

Mo. No. 284

JOHN L. LASCARIS, Commissioner of the Department of Social Services of Onondaga County,

Appellant,

vs.

GEORGE K. WYMAN, Individually and as Commissioner of the Department of Social Services of the State of New York,

Respondent,

CHARLES BUGNACKI & etc.,

Intervenors-Respondents.

Motion by Chamber of Commerce of the United States of America for leave to intervene herein and for reargument of the appeal denied.

APPENDIX C

STATE OF NEW YORK,

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fourth day of May A. D. 1973.

Present, HON. STANLEY H. FULD, *Chief Judge, presiding.*

Mo. No. 360

JOHN L. LASCARIS, Commissioner of the Department of Social Services of Onondaga County,

Appellant,

vs.

GEORGE K. WYMAN, Individually and as Commissioner of the Department of Social Services of the State of New York,

Respondent,

CHARLES SUGNACKI & etc.,

Intervenors-Respondents.

A motion having heretofore been made upon the part of the Chamber of Commerce of the United States of America to vacate the order of this Court dated March 22, 1973 denying a motion for leave to intervene and for reargument, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy

/s/ Illegible

Deputy Clerk

[SEAL]

APPENDIX D

At a Motion Term of the Supreme Court held in and for the County of Chemlaga at the Court House in the City of Syracuse, New York, on the 10th day of August, 1971.

Present: HONORABLE RICHARD ARONSON, *Judge Presiding.*

JOHN L. LASCARIS, Commissioner of the Department of Social Services of Onondaga County,

Plaintiff,

vs.

GEORGE K. WYMAN, Individually and as Commissioner of the Department of Social Services of the State of New York,

Defendant.

ORDER

Index No. 41-4532

The plaintiff herein having commenced a proceeding against the defendant for a declaratory judgment seeking an interpretation of Section 131 of the Social Services Law of the State of New York in respect to the right of striking employees to receive public assistance benefits, and having made a motion for a preliminary injunction enjoining the defendant from discontinuing State and Federal assistance to the plaintiff in the event the plaintiff does not grant public assistance to striking employees of Communication Workers of America, and from making any determination concerning the right of striking employees to receive public assistance pending the final determination of this lawsuit, and said motion having come on regularly to be heard,

Now, on reading the Order to Show Cause dated the 5th day of August, 1971, and the Complaint duly verified the 4th day of

August, 1971, and the affidavit of John L. Lascaris, the plaintiff, sworn to the 4th day of August, 1971, in support of said application, and the affidavit of Sidney L. Grossman, Assistant Attorney General of the State of New York, sworn to the 10th day of August, 1971, in opposition to said application, and after hearing Leonard C. Koldin, Chondaga County Welfare Attorney, attorney for plaintiff, in support of said application, and Sidney L. Grossman, Assistant Attorney General of the State of New York, attorney for defendant, in opposition thereto,

Now, on motion of Leonard C. Koldin, attorney for plaintiff, it is

ORDERED, that pending the final determination of this action and the further order of this Court, the defendant, his agents, servants, employees and attorneys are hereby enjoined during the pendency of this action from discontinuing or threatening to discontinue State and Federal assistance to the plaintiff in the event the plaintiff does not grant public assistance to striking employees of Communication Workers of America, or from taking any action or making or enforcing any determination regarding the right of striking employees as a result of a union-management conflict, strike or industrial controversy to receive public assistance.

Signed at Syracuse, New York, on the 27th day of August, 1971.

ENTER.

/s/ RICHARD ARONSON,
Justice of the Supreme Court

APPENDIX E

JOHN L. LASCARIS, Commissioner of the Department of Social Services of Onondaga County,

Plaintiff,

v.

GEORGE D. WYMAN, Individually and as Commissioner of the Department of Social Services of the State of New York,

Defendant,

CHARLES BUGNACKI, et al.,

Defendant-Interveners.

SUPREME COURT, ONONDAGA COUNTY.

Oct. 15, 1971.

Action for declaration of right of striking employees to public assistance. On motion to dismiss the complaint, the Supreme Court, Onondaga County, Richard N. Donovan, J., held that the July 1970 amendment to the Social Services Law did not entitle striking employees to welfare benefits during period employment was available to them with struck employer pending settlement of strike.

Motion granted.

Right to public assistance is dependent on statutory provisions.

The July 1970 amendment to the Social Services Law did not entitle striking employees to welfare benefits during period employment was available to them with struck employer pending settlement of strike. Social Services Law § 131.

Leonard C. Koldin, for plaintiff.

Louis J. Lefkowitz, Atty. Gen. by Sidney Grossman, New York City, of counsel, for defendant.

Blitman & King by Bernard T. King, Syracuse, of counsel, for defendant-interveners.

Lipsitz, Green, Fahringer, Roll, Schuller & James by Carmin P. Putrino, Buffalo, of counsel, for Communications Workers of America as amicus curiae.

RICHARD N. DONOVAN, *Justice.*

The Plaintiff brought this action against the Defendant, Commissioner Wyman, for a Declaratory Judgment and more particularly seeking an interpretation of Section 131 of the Social Services Law of the State of New York. Thereafter, by permission of this Court, Defendant-Interveners were allowed to become Party Defendants. By stipulation of the parties, the Communication Workers of America were allowed to appear as Amicus Curiae. The Motion before this Court is to dismiss the complaint for failure to state a cause of action. All parties agree they are seeking Summary Judgment.

The parties substantially agree upon the following facts: During the month of July, 1971, all members of the Communication Workers of America went on strike, including the members of Locals 1123, 1152, 1191 and 1197. A settlement was reached between the employers and the national union subject to ratification by the local unions. Thereafter, all locals ratified the national agreement with the exception of the locals who are the Defendant-Interveners in this action. These locals have continued their strike to the present time. Following the Decision of Justice O'Donnell in "Lascaris v. Wyman", 61 Misc. 2d 212, 305 N. Y. S. 2d 212, Section 131 of the Social Services Law was amended, the latest amendment became effective July 1st, 1971. Shortly after the strike began, the three individual Defendant-Interveners applied for welfare benefits from the Plaintiff and were denied the same. Subsequently, and at the present time, the dependent members of the individuals families were given public assistance but the strikers were not and they continue to be denied public assistance.

The parties further agree the Defendant-Interveners and others similary situated would be accepted for employment by the companies against whom they are striking if they applied for employment. They further agree these three men have com-

plied with Section 131 of the Social Services Law in that they have registered with the nearest Employment Agency of the Department of Labor.

The crux of this controversy is whether or not striking employees are entitled to welfare benefits when employment with the company is available to them and while a settlement of the strike is still pending.

The Defendants place great reliance upon the Decision of Justice O'Donnell in the action of "Lascaris v. Wyman" decided November 12th, 1969, and reported at 61 Misc. 2d 212, 305 N. Y. S. 2d 212. They contend the same circumstances and parties exist in this case except that it was the General Electric strike rather than the present labor-management controversy. Of course, they also contend this Court should reach the same conclusion.

The Plaintiff, on the other hand, claims different circumstances exist in that the Legislature amended Section 131 of the Social Services Law in 1970 and again in 1971.

In the opinion of this Court, the issue is not whether the unions or employees have a right to strike nor whether the strike was authorized or unauthorized or whether refusal to grant welfare assistance is interference in a labor-management controversy. The sole issue to be determined is what effect the amendments have upon the right of strikers to receive public assistance.

[1, 2] The right to public assistance is dependent upon statutory provisions. Section 131 of the Social Services Law particularly deals with the entitlement of an employable person to assistance and care. There is no question but what these men are employable in that they are capable of doing the work and the employer has a job opening and will take them back. The only reason they are not self-supporting is the labor-management controversy. Since they are employable, it becomes neces-

sary to determine the legislative intent when Section 131 was amended. It seems to this Court that the Legislature must have been well aware of the earlier controversy which was decided by Justice O'Donnell when it enacted the change in Section 131. The Legislature could easily have included amongst those persons people who were unemployed because of labor-management controversies. The Legislature did not make that exception and in this Court's opinion thereby eliminated strikers from entitlement to public assistance, no matter how justified their grievance.

Justice O'Donnell in his Decision found that Section 131 of the Social Services Law and Section 592 of the Labor Law should be read together. The legislative intent seems to be consistent in both of these Sections in that it restricts entitlement to public assistance and unemployment insurance benefits to persons who are employable or have a source of income from employment available to them. Had the legislative intent been to the contrary, the Legislature would have eliminated the waiting period under the Labor Law and included striking employees in subdivision 4 of Section 131.

Therefore, it is the finding of this Court the three individual Defendant-Interveners and all other similarly situate, are not entitled to public assistance and the Plaintiff shall not furnish the same. This Court further finds the Defendant, George D. Wyman, as Commissioner of the Department of Social Services of the State of New York, shall continue State and Federal contributions to the Plaintiff, as Commissioner of the Department of Social Services of Onondaga County.

The Plaintiff, is directed to submit on Order in accordance with this Decision, without costs.

APPENDIX F

SUPREME COURT

Appellate Division-Fourth Division

JOHN L. LASCARIS, as Commissioner of Social Services of Onondaga County,

Respondent,

v.

GEORGE K. WYMAN, Individually and as Commissioner of Social Services of the State of New York,

Appellant.

CHARLES BUGNACKI, ET AL.,

Intervenors-Appellants.

Fourth Department, January 20, 1972.

Social services—assistance to strikers—public welfare assistance may not be denied to striking union members in need of such assistance—no weight in argument that granting assistance would violate State's policy to remain neutral in industrial controversies—grant of assistance does not affect Federal collective bargaining policy—inappropriate for social welfare agency to inquire into legality of strike.

1. Subdivision 4 of section 131 of the Social Services Law provides that public assistance shall not be given to an employable person who has not registered with the nearest employment office of the Department of Labor, or who has refused to accept employment for which he is fitted and able to accept. A striking union member's refusal to work for his employer during a strike does not constitute such a refusal to accept employment as envisioned by subdivision 4 of section 131 as to warrant denial of public assistance to him. To hold that a refusal by a striker to work for his employer would serve as a basis for denial of public assistance would subject union employees to

union sanctions (fines, expulsions, etc.) if they refused to obey strike orders and denial of welfare benefits if they did, and would thus be tantamount to a denial to them of their right to strike guaranteed under Federal and State law.

2. There is little weight in the argument that granting welfare assistance to strikers would violate the State's policy to remain neutral in industrial controversies.

3. The granting of welfare benefits to strikers does not affect Federal collective bargaining policy.

4. Even though the strike was unauthorized and in violation of a no-strike clause, it is not appropriate or wise for a social welfare agency to inquire into the legality of a strike. The question of "fault" in work stoppage is best left to Federal and State Labor Boards specially qualified to deal with them.

APPEAL from an order of the Supreme Court at Special Term (RICHARD N. DONOVAN, J.), entered October 26, 1971 in Onondaga County, which granted a motion by plaintiff for summary judgment and declared that strikers are not entitled to public welfare assistance.

Louis J. Lefkowitz, Attorney-General (*Sidney L. Grossman, Ruth Kessler Toch* and *Harvey R. Lasner* of counsel), for appellant.

Blitman & King (*Bernard T. King* of counsel), for intervenors-appellants.

Philip Pinsky (*Leonard C. Koldin* of counsel), for respondent.

Lipsitz, Green, Fahringer, Roll, Schuller & James (*Carmen Putrino* of counsel), for Communication Workers of America, *amicus curiae*.

Bond, Schoeneck & King for Chamber of Commerce of United States, *amicus curiae*.

CARDAMONE, J. We are asked to review a determination made at Special Term that denied strikers the right to receive

welfare benefits. We believe that determination should be reversed because the law so provides. Welfare assistance will only be granted to those strikers who are in need; and in the absence of a very lengthy strike, welfare benefits will generally be needed only during the first seven weeks of a strike, after which unemployment insurance benefits would be payable to the strikers (Labor Law, § 592, subd. 1; Social Services Law, § 131-a).

The pertinent facts are not in dispute. The plaintiff, John Lascaris, Commissioner of Social Services of Onondaga County, commenced a declaratory judgment action after members of the Communications Workers of America (CWA), including members of Locals 1123, 1152, 1191, and 1197 of the Greater Syracuse Labor Council, went on strike on July 14, 1971. He sought a declaration that section 131 of the Social Services Law precludes striking union employees[1] from receiving public assistance. The defendant, George K. Wyman, Commissioner of Social Services, has determined, on the contrary, that welfare assistance shall be granted to those unable to maintain themselves where the applicant stays away from work because he is a member of a union on strike. Charles Bugnacki, Earl Auslander, and Thomas Gentile were permitted to intervene, individually and on behalf of all other members of Locals 1123, 1152, 1191, and 1197, as party defendants.

The plaintiff, Onondaga County Commissioner of Social Services, and the defendant, State Commissioner, both moved for summary judgment in the declaratory judgment action. Special Term denied the defendant's motion, and in granting plaintiff's motion decreed that the individual defendant-intervenors and all others similarly situated were not entitled to public assistance and directed plaintiff not to furnish the same, and further ordered the defendant State Commissioner to con-

1. The rights of the strikers' wives and children are not at issue. The record reveals that those dependents who are entitled thereto are receiving public assistance.

tinue State and Federal contributions to the County Commissioner without regard to plaintiff's denial of public assistance to defendant-intervenors and others similarly situated.

It is from this determination that defendant State Commissioner and the defendants-intervenors appeal.

Since only a question of law was presented, the awarding of summary judgment was appropriate. However, while there is a dearth of case law and no statute which by its express terms controls the issue before us, we hold that summary judgment granted by Special Term to the plaintiff should, instead, have been awarded to the defendant State Commissioner. A review of the legislative history of section 131 of the Social Services Law leads inescapably to this conclusion. Subdivision 1 of that section expresses the purpose of welfare assistance in this State: "It shall be the duty of social services officials * * * to provide adequately for those unable to maintain themselves * * * and shall further give such service to those liable to become destitute as may prevent the necessity of their becoming public charges." Subdivision 4 was added in 1959 (L. 1959, ch. 715) to provide that assistance shall not be given to an *employable* person who has not registered with the nearest employment office of the Department of Labor, or who has refused to accept employment for which he is fitted and able to accept. This subdivision was amended in 1969 (L. 1969, ch. 184, § 4) by the addition of four paragraphs which enumerated certain actions which were deemed to constitute refusal to accept employment.[2]

2. "A person shall be deemed to have refused to accept such employment if he: a. fails to obtain and file with the social services district at least once in every two-week period a new certificate from the appropriate local employment office of the state department of labor stating that such employment office has no order for an opening in part-time, full-time, temporary or permanent employment in which the applicant is able to engage, or b. wilfully fails to report for an interview at an employment office with respect to employment when requested to do so by such office, or c. wilfully fails to report to such office the result of a referral to employment, or d. wilfully fails to report for employment."

Following the 1969 amendment, plaintiff commenced an action to obtain a determination of the same issues presently before us. Special Term of Onondaga County (O'DONNELL, J.) concluded that striking employees were entitled to welfare benefits (*Lascaris* v. *Wyman*, 61 Misc. 2d 212). No appeal was taken from that determination.

Under the statute in 1969 the issue was whether a striker was an "employable person"; and as a further issue, whether his refusal to work for his employer during a strike constituted a "refusal" to accept employment within the meaning of subdivision 4 of section 131.

It is obvious that a striker is an "employable individual" at least for the duration of the strike. Of course, if a striking worker refuses to accept employment, then public assistance should be denied (Social Services Law, § 131, subd. 4, par. d) in *Matter of Martinez* (decision of Commissioner of Social Services, dated Aug. 3, 1971).

The other issue is whether a striking union member's refusal to work for his employer during the strike constitutes a refusal to accept employment as envisioned by subdivision 4 of section 131. Since the Supreme Court has held that a union may impose fines, with the implicit threat of expulsion, upon union members who decline to honor an authorized strike (*NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 178-195), a refusal by a union member to work for his employer during the continuance of a strike can hardly be viewed as a "voluntary act". We do not believe the Legislature could have intended that such a refusal by a striker to work for his employer would serve as the basis for denial of public assistance. To so hold would subject union employees to union sanctions if they refused to obey strike orders and denial of welfare benefits if they did, and would thus be tantamount to a denial to them of their right to strike guaranteed

them under Federal[3] and State law (U. S. Code, tit. 29, §§ 157, 163; Labor Law, § 713).

Some further insight into the legislative intent may be gleaned by an examination of the statutory provisions respecting unemployment compensation. There the Legislature provides that "no refusal to accept employment shall be deemed without good cause nor shall it disqualify any claimant otherwise eligible to receive benefits if there is a strike, lockout, or other industrial controversy in the establishment in which the employment is offered". (Labor Law, § 593, subd. 2, par. [b].)

While it would appear that a majority of the States permit welfare payments to strikers,[4] only two cases have considered the legality of such practice, both of which upheld the policy of granting welfare to strikers in the states of Illinois and Massachusetts (*Strato-O-Seal Mfg. Co.* v. *Scott*, 72 Ill. App. 2d 480; *ITT Lamp Div. of Int. Tel. & Tel. Corp.* v. *Minter*, 435 F. 2d 989, cert. den. 402 U. S. 933) Indeed, as the Attorney-General argues, it has been the administrative policy of the defendant State Commissioner to pay welfare benefits to striking workers in 11 major strikes[5] in this State over a period of the past 20 years

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3. Congress has not passed any legislation which expressly grants or denies Federally funded assistance to strikers. However, last June an amendment to a Department of Agriculture appropriation bill which would have made food stamps unavailable to any household "which needs assistance solely because any member of such household is a participant in * * * [a] strike", was debated and defeated in the House of Representatives by a vote of 172 [for] to 225 [against], 117 Cong. Rec. H 5805-5810 (daily ed. June 23, 1971).

4. "Strikers on Welfare: Workers on Public Aid During Walkouts Draw Increasing Criticism", *Wall Street Journal*, July 14, 1971 at 1, 10. This article reports that during the 101-day strike against G. E. in 1969-70, only 3 of the 33 States in which G. E. operates showed "any disposition to bar strikers from collecting state welfare aid."

5. 1952 "Lyon Mountain" strike (Clinton County); 1955 "N. Y. Airbrake Co." strike (Jefferson County); 1956 "Operating Engineers" strike (St. Lawrence County), "Federal Bearing" strike

Thus, we conclude that immediately prior to the 1971 amendment to subdivision 4 of section 131 of the Social Services Law, strikers were eligible to receive public assistance provided that they registered with the State employment office and did not refuse any new employment opportunities.

In 1971 subdivision 4 of section 131 was amended (L. 1971, ch. 298, § 5, eff. May 24, 1971) by the addition of a number of sentences.[6] It is clear from a reading of the added language that it merely designated certain classes of people as being not deemed "employable", i.e., it enumerated those who are "unemployable" for such reasons as illness or incapacitation, either physical or mental, or advanced age. It was the obvious purpose of this amendment to remove those designated by the added language from the status of an "employable person", and thus exempt them (because of the hardship involved) from the requirement of registering with the local department of labor office in order to be entitled to public assistance. The 1971 amendment made no change with respect to "employable persons". Since strikers were and are "employable persons" under the statute, the amendment to subdivision 4 of section 131 of

(Dutchess County), "National Cash Register" strike (Cayuga County), "West Virginia Pulp & Paper Co." strike (Saratoga and Rensselaer Counties); 1957 "Barnett Slipper & Sky Dryne Co." strikes (Orange County); 1956-59, Statewide "Steel Strikes", e.g. Bethlehem Steel; 1961 "R. T. French Co." strike (Monroe County); 1966 "General Electric Co." strike (Schenectady County); 1969 "Crouse Hinds Co." strike (Onondaga County).

6. "a person shall be deemed employable if such person is not rendered unable to work by: illness or significant and substantial incapacitation, either mental or physical, to the extent and of such duration that such illness or incapacitation prevents such person from performing services; advanced age; full-time attendance at school in the case of [a] minor, in accordance with provisions of this chapter, full-time, satisfactory participation in an approved program of vocational training or rehabilitation; the need of such person to provide full-time care for other members of such person's household who are wholly incapacitated, or who are children, and for whom required care is not otherwise reasonably available, notwithstanding diligent efforts by such person and the appropriate social services department to obtain others to provide such care."

the Social Services Law does not affect their rights to receive welfare. The Legislature was again silent as to the rights of employees to receive benefits while on strike. But it seems hardly conceivable that it was unaware of the long standing administrative policy of the State Department of Social Services holding strikers eligible for public assistance. Under these circumstances we conclude that the Legislature did not eliminate strikers from entitlement to public assistance by failing to include them in the category of those deemed "unemployable"; nor may its silence on this subject be reasonably construed to indicate a legislative intent to change administrative policy extant for 20 years. Rather, it seems more reasonable to conclude that the Legislature is satisfied with the law as it has been and is presently administered.

Several other issues remain to be considered. The plaintiff urges that granting welfare assistance to strikers would violate the State's policy, as evidenced by the Unemployment Insurance Law, to remain neutral in industrial controversies. Clearly, however, unemployment compensation and welfare assistance serve different purposes. Public assistance is designed to supply unmet subsistence needs while unemployment compensation is designed to cushion the shock of seasonal, cyclical, or technological unemployment without reference to demonstrated needs. (*ITT Lamp Div.* v. *Minter*, *supra*, p. 994.) It should be noted that we are here dealing only with a subsistence level of living and *not* a replacement of a striker's wages. It further appears that while payment of these benefits may support workers and foster strikes, by the same token its denial supports employers, encourages lockouts, and discourages strikes. Accordingly, the so-called "neutrality" argument is entitled to little weight. More persuasive in this determination is the broad humanitarian policy clearly enunciated by the Legislature in section 131 of the Social Services Law.

The last two contentions of plaintiff are that Federal preemption in the field of collective bargaining mandates neutrality

by the States, and that the granting of welfare benefits to strikers would intrude upon the Federal scheme; and that the strike in the instant matter was unauthorized and illegal because it violated a no-strike clause. With respect to the former, we believe the First Circuit Court of Appeals (the only Federal court to consider this issue) correctly concluded that it was doubtful that the granting of benefits to strikers would effect "a significant frustration of federal collective bargaining policy" and that, in view of the State's substantial police power it should not be assumed that Congress intended to deprive the State of the power to serve its interests to promote public welfare (*ITT Lamp Div.* v. *Minter, supra,* pp. 992-994, cert. den. 402 U. S. 933, *supra*). With respect to the final issue, our Court of Appeals has recognized that it is not appropriate or wise for a social welfare agency to inquire into the legality of a strike, but suggests that the question of "fault" in work stoppage is best left to Federal and State Labor Boards especially qualified to deal with them (*Matter of Heitzenrater* [*Hooker Chem. Corp.*], 19 N. Y. 2d 1, 7).

The order should be reversed and judgment declared in favor of defendant-appellant Commissioner of Social Services of the State of New York.

MARSH, *J. P.*, WITMER, MOULE and HENRY, *J.J.*, concur.

Judgment unanimously reversed on the law and facts without costs and judgment declared in favor of defendant-appellant Commissioner of Social Services of the State of New York in accordance with the opinion by CARDAMONE, J.

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

NEW YORK SOCIAL SERVICES LAW

(N. Y. Rev. Stat., Art. 5)

§ 131. Assistance, care and services to be given

1. It shall be the duty of social services officials, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves, in accordance with the requirements of this article and other provisions of this chapter. They shall, whenever possible, administer such care, treatment and service as may restore such persons to a condition of self-support or self-care, and shall further give such service to those liable to become destitute as may prevent the necessity of their becoming public charges.

* * * * *

3. For needy persons who are members of a family household, the standard of need for determining their eligibility for public assistance shall be as prescribed by section one hundred thirty-one-a of this chapter and applicable federal requirements. For needy persons who are not members of a family household, the department shall continue to determine the standard of need for determining their eligibility for public assistance pursuant to the provisions of this chapter and applicable federal requirements.

4. No assistance or care shall be given to an employable person who has not registered with the nearest local employment agency of the department of labor or has refused to accept employment in which he is able to engage.

A person shall be deemed to have refused to accept such employment if he:

a. fails to obtain and file with the social services district at least semi-monthly a new certificate from the appropriate local employment office of the state department of labor stating that such employment office has no order for an opening in part-time, full-time, temporary or permanent employment in which the applicant is able to engage, or

b. willfully fails to report for an interview at an employment office with respect to employment when requested to do so by such office, or

c. willfully fails to report to such office the result of a referral to employment, or

d. willfully fails to report for employment. Such willful failures or refusals as above listed shall be reported immediately to the social services district by such employment office.

For the purposes of this subdivision and subdivision five, a person received or applying for home relief shall be deemed employable if such person is not rendered unable to work by: illness or significant and substantial incapacitation, either mental or physical, to the extent and of such duration that such illness or

incapacitation prevents such person from performing services; advanced age; full-time attendance at school in the case of a minor, in accordance with provisions of this chapter; full-time, satisfactory participation in an approved program of vocational training or rehabilitation; the need of such person to provide full-time care for other members of such person's household who are wholly incapacitated, or who are children and for whom required care is not otherwise personably available notwithstanding diligent efforts by such person and the appropriate social services department to obtain others to provide such care. A person assigned to and participating in a public works project under the provisions of section one hundred sixty-four or three hundred fifty-k of this chapter shall be deemed to be employable but not employed. For the purposes of this subdivision and subdivision five, a person receiving or applying for aid to dependent children shall be deemed employable in accordance with the provisions of section three hunderd fifty-e of this chapter, except that a mother who is unable to work by her need to provide full-time care for her children, and for whom required care is not otherwise reasonably available notwithstanding diligent efforts by such mother and the appropriate social services department to provide such care shall not be deemed.

Every employable recipient of public assistance who is not engaged in regular full-time employment shall receive his public assistance grants and allowances in person from the division of employment of the state department of labor, in accordance with regulations of the department.

Such regulations may provide for including the full amount of any shelter allowance in one of the semi-monthly grants and allowances made to such an employable recipient of public assistance.

Notwithstanding section three hundred fifty-e or any other provisions of this chapter, the provisions of this subdivision shall apply to applicants for or recipients of aid to dependent children until such time as they are enrolled and participating in the Work Incentive Prograrnm.

5. Notwithstanding the requirements of subdivision four of this section, a local employment office of the state department of labor may refer an employable person for participation in a program of occupational training when the judgment of the state department of labor the person may thereby become trained for referral to available employment, or when the person may thereby become trained for referral to skilled or semi-skilled employment. So long as the person accepts the referral to such program of training and participates in such program, the requirements of subdivision four of this section relating to the filing of a bi-weekly certificate from the local employment office shall be suspended.

6. * * * *

* * * * *

c. The provisions of this section shall not confer authority on a social services official to provide instruction which is available through the public school system, but regulations of the department may make provision for such authority when special need therefor is demonstrated.

7. Formerly 6.

8. Any inconsistent provision of this chapter notwithstanding, applicants for and recipients of services required to be provided by social services officials in accordance with federal and state requirements shall have the right to appeal local decisions relating to such services and to have opportunity for fair hearings thereon, when and under the circumstances prescribed by regulations of the department.

9. Upon determining that a person is eligible for any form or category of public assistance, the social services official shall issue to any such person to whom payment is to be made, an appropriate identification card, with a photograph affixed, in a form approved by the department, which shall be used as the department, by regulation, may prescribe for improved administration. Any person, including the drawee bank, may

require the presentation of such identification card as a condition for the acceptance and payment of a public assistance check.

10. Any person who voluntarily terminated his employment or voluntarily reduced his earning capacity for the purpose of qualifying for home relief or aid to dependent children or a larger amount thereof shall be disqualified from receiving such assistance for seventy-five days from such termination or reduction, unless otherwise required by federal law or regulation. Any person who applies for home relief or aid to dependent children or requests an increase in his grant within seventy-five days after voluntarily terminating his employment or reducing his earning capacity shall, unless otherwise required by federal law or regulation, be deemed to have voluntarily terminated his employment or reduced his earning capacity for the purpose of qualifying for such assistance or a larger amount thereof, in the absence of evidence to the contrary supplied by such person.

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(134-D)

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1726

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Petitioner,

against

GEORGE K. WYMAN, Individually and as Commissioner of the Department of Social Services of the State of New York, and GEORGE BUGNACKI, EARL M. AUSLANDER, THOMAS GENTILE, etc.,
Respondents,

JOHN L. LASCARIS, Commissioner of the Department of Social Services of Onondaga County, New York,
Appellant-Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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Respondents,

JOHN L. LASCARIS, Commissioner of the Department of Social Services of Onondaga County, New York,

Appellant-Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

This petition arises from the order of the Court of Appeals of the State of New York in an action for a declaratory judgment instituted by John L. Lascaris, Com-

missioner of the Department of Social Services of Onondaga County, New York, against George K. Wyman, Commissioner of the Department of Social Services of the State of New York. The plaintiff in the action, Commissioner Lascaris, sought a judgment declaring that section 131 of the Social Services Law of New York, as amended in 1971, precluded the payment of welfare benefits to strikers. The New York Court of Appeals affirmed the order of the New York Appellate Division of the Supreme Court, Fourth Judicial Department, which reversed a judgment of the New York Supreme Court, Onondaga County, and declared that welfare benefits were available to persons engaging in a strike against their employer.

In July of 1971, employees of the New York Telephone Company, represented by several locals of the Communication Workers of America in New York State, went out on strike. Shortly thereafter applications were made by several strikers in Onondaga County for welfare benefits. Commissioner Lascaris denied the applications on the ground that strikers were ineligible for public assistance under the terms of Social Services Law, § 131 as amended, contrary to a position held by the State Commissioner of Social Services, and instituted this action against the State Commissioner for a declaratory judgment that strikers were not eligible for welfare payments. After the action was commenced, three strikers, acting individually and on behalf of others similarly situated, were permitted to intervene as defendants. Judgment was rendered by the New York State Supreme Court, Onondaga County in favor of the plaintiff Lascaris, declaring that strikers were ineligible for public assistance under New York State Law.

That judgment was appealed by the defendants to the Appellate Division of the Supreme Court for the Fourth Judicial Department. At that point, the Chamber of Commerce of the United States of America, petitioner in this application (hereafter "the Chamber") sought leave to intervene as a party in support of the positions of plaintiff-respondent Lascaris. The Appellate Division denied the motion to intervene, but granted permission to the Chamber to file a brief as *amicus curiae*.

The Appellate Division reversed the judgment of the State Supreme Court and the plaintiff Commissioner appealed to the Court of Appeals. Again, the Chamber moved for permission to intervene in support of the appellant. Permission was again denied, and the Chamber filed a brief *amicus curiae*. When the Court of Appeals affirmed the order of the Appellate Division, Commissioner Lascaris did not seek any further appeal. The Chamber however moved for reargument and permission to intervene upon reargument. The motion was denied. Undaunted, the Chamber again moved the Court of Appeals to vacate its prior order denying reargument and intervention, and that motion was similarly denied. The instant petition for certiorari by the Chamber followed.

Opinions Below

The opinion of the New York Court of Appeals (31 N Y 2d 386) and of the Appellate Division, Fourth Department (8 A D 2d 163) deal with the substance of plaintiff's action and not with petitioner's application to intervene. They are set forth as Appendix "A" and Appendix "F", respectively, annexed to the Petition. Petitioner's several motions for intervention and reargument were denied without opinion.

Question Presented

Did the petitioner have such a substantial direct interest in the subject matter of the underlying action as to entitle it to intervene as a matter of right, or to make the several denials of its application to intervene an abuse of discretion by the State Courts?

Reasons for Denying Certiorari

The provisions of §§ 1012 and 1013 of the New York Civil Practice Law and Rules, governing intervention in an action as of right and by permission, respectively, are substantially similar to the provisions of Rule 24 of the Federal Rules of Civil Procedure. In fact, those sections were consciously patterned after the Federal Rule (*cf. Matter of Petroleum Research Fund*, 3 New York A D 2d 1 [Appellate Division, Fourth Department, 1956], Weinstein, Korn, Miller, *New York Civil Practice*, Vol. 2, § 1012.01) and accordingly, Federal and New York State decisions may be applied to the question here with equal validity.

That the petitioner would have no "right" to intervene, either under CPLR § 1012 or Federal Rule 24, seems clear: there is no right existing by virtue of any other statute (*cf. Brotherhood of Railroad Trainmen* v. *B. & O. Railroad Co.*, 331 U. S. 519 [1946]) and petitioner claims none. Nor can it be claimed reasonably that petitioner has an interest "relating to the property or transaction which is the subject of the action" and that such interest is not adequately represented by the existing parties (Federal Rules of Civ. Procedure, Rule 24 [a]). What is required here is a "direct, substantial, legally protectable interest

in the proceedings" (*Hobson* v. *Hansen*, 44 F. R. D. 18, 24 [D. D. C. 1968]; *Diaz* v. *Southern Drilling Corp.*, 427 F 2d 1118 [5th Cir., 1970], cert. den. 400 U. S. 878)—a "significantly protectable interest" (*Donaldson* v. *U. S.*, 400 U. S. 517 [1971]). In addition, the claimed interest must be relevant to the issues in controversy. (*Norwalk CORE* v. *Norwalk Board of Education*, 298 F. Supp. 208 [D. Connecticut 1968]).

The interest asserted by the petitioner here is not an interest in property, nor is it a direct and substantial interest in the subject matter of the action. Petitioner, as a non-profit association, has no direct interest in the controversy—it is not seeking to intervene as a taxpayer in New York State, and cannot thus be aggreived by the policies or practices of welfare administration in the State. Nor, for that matter, has it sought to intervene as an employer in this State, having a direct interest in the settlement of labor disputes. In any event, the interest which petitioner does assert—that the payment of public assistance to strikers promotes and prolongs labor disputes—is totally irrelevant to the subject matter of this declaratory judgment action. The sole issue in the action in the New York courts was the eligibility of strikers, as "employable" persons, for public welfare under New York Social Services Law, § 131. While the Chamber is disappointed in the outcome of this action, we submit that a mere interest in the success of one of the parties does not constitute a legally protectable interest. Accordingly petitioner does not meet any of the requirements for intervention as of right. (*Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683 [1961]; *Blocker* v. *Board of Education of Manhasset*, N. Y., 229 F. Supp. 714 [Dist. Ct. E. D. N. Y.

1964]; *Hobson* v. *Hansen, supra; Simadiris* v. *Hotel Waldorf Astoria,* 281 App. Div. [N. Y.] 665 [1st Dept., 1952]; *United Baking Co.* v. *Bakery & Confectionary Workers Union,* 257 App. Div. [N. Y.] 665 [3d Dept., 1939]).

While the denial of intervention sought as a matter of right is appealable as of right, intervention by permission is a matter of discretion and denial of permission is appealable only to the extent that such denial constitutes an abuse of discretion (*Sam Fox Publishing Co.* v. *United States, supra*). In the present case, denial of permission to petitioner to intervene was properly and reasonably exercised. Petitioner obviously had no interest in the merits of the controversy, except that a judgment in favor of plaintiff would suit the ends of petitioner and its members. The reasons upon which petitioner appealed to the Courts' discretion—that the payment of welfare benefits to strikers encouraged and prolonged labor disputes—was clearly extraneous to the issue which plaintiff was sincerely and vigorously litigating in the public interest. There was no "common question of law or fact" in the issue raised by plaintiff and that sought to be raised by petitioner.

Accordingly, we submit, denial of permission to intervene under the circumstances was a proper and reasonable exercise of discretion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: July 9, 1973.

Respectfully submitted,

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October Term, 1972

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THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

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Respondents,

JOHN L. LASCARIS, Commissioner of the Department of Social Services of Onondaga County, New York,

Appellant-Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION FOR RESPONDENTS CHARLES BUGNACKI, EARL M. AUSLANDER, THOMAS GENTILE, etc.

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July 19, 1973

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IN THE

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October Term, 1972

No. 72-1726

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Petitioner,

vs.

GEORGE K. WYMAN, Individually and as Commissioner of the Department of Social Services of the State of New York, and CHARLES BUGNACKI, EARL M. AUSLANDER, THOMAS GENTILE, etc.,

Respondents,

JOHN L. LASCARIS, Commissioner of the Department of Social Services of Onondaga County, New York,

Appellant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION FOR RESPONDENTS CHARLES BUGNACKI, EARL M. AUSLANDER, THOMAS GENTILE, etc.

OPINIONS BELOW

The opinion of the New York Court of Appeals (Appendix A of Petition, p. A1-A9) is reported at 31 N.Y.2d 386. The opinion of the New York Supreme Court, Appellate Division (Appendix F of Petition, p. A18-A26) appears at 38 A.D.2d 163. The opinion of the New York Supreme Court, Motion Term (Appendix E of Petition, p. A14-A17) appears at 68 M.2d 523.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

A motion for reargument was denied on May 4, 1973 (Appendix C of Petition, p. A11) and the petition was filed on June 20, 1973. However, said petition did not conform with Rule 39 of the Rules of this Court, in that it was not printed. The petition must therefore be dismissed for that reason, and for the reasons hereinafter set forth.

QUESTIONS PRESENTED

1. Is denial of party status to the Chamber reviewable by this Court?

2. Is the decision below reviewable by this Court?

STATUTES AND RULES INVOLVED

Section 1013 of the Civil Practice Law and Rules:

"§1013. Intervention by permission.

Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party."

Rule 24 of the Federal Rules of Civil Procedure provides, in relevant part:

"(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"(c) PROCEDURE . . . . The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. . . ."

The relevant parts of Section 131 of the Social Services Law of the State of New York are set forth in Appendix G of the petition (p. A27-A31).

STATEMENT

The case was commenced as a declaratory judgment action seeking an interpretation of Section 131 of the Social Services Law of the State of New York (Appendix G of Petition, p. A27-A31). It was brought by John L. Lascaris, Commissioner of the Department of Social Services of Onondaga County (hereafter "Lascaris"); commenced by service of a Summons and Complaint upon George K. Wyman, Commissioner of the Department of Social Services of the State of New York (hereafter "Wyman"). The action arose out of a strike by employees of the New York Telephone Company represented by the Communications Workers of America. Shortly after the strike commenced Lascaris received applications from strikers for welfare assistance under Section 131 of the New York Social Services Law. Said applications were summarily denied on the grounds that a recent amendment to Section 131 made strikers ineligible thereunder.

After the filing of the suit Charles Bugnacki, 1/ Earl M. Auslander, Thomas Gentile, individually and on behalf of all

---

1/ Erroneously named in the caption of the petition as George Bugnacki.

other members of Locals 1123, 1152, 1191 and 1197 of the Communications Workers of America, who are similarly situated, the said locals individually and the Greater Syracuse Labor Council (all referred to hereafter as "Bugnacki, et al.") intervened, as of right. Bugnacki, et al. then moved to dismiss the complaint. The motion was treated as one for summary judgment, and granted in favor of Lascaris [*Lascaris* v. *Wyman and Bugnacki, et al.*, 68 M.2d 523 (Sup. Ct. Onondaga Co. 1971) (Appendix E of Petition, p. A14-A17)]. This decision was unanimously reversed by the Supreme Court, Appellate Division, which held that striking employees, otherwise qualified, were eligible to receive welfare benefits [*Lascaris* v. *Wyman and Bugnacki, et al.*, 38 A.D.2d 163 (4th Dep't. 1972) (Appendix F of Petition, p. A18-A26)]. This decision was unanimously affirmed by the New York Court of Appeals [*Lascaris* v. *Wyman and Bugnacki, et al.*, 31 N.Y.2d 386 (1972) (Appendix A of Petition, p. A1-A9)].

The Chamber of Commerce of the United States of America (hereafter "Chamber") sought permissive intervention [N.Y. Civil Practice Law and Rules §1013] before the Appellate Division and before the New York Court of Appeals. All such applications were denied, although the Chamber was permitted to participate as *amicus curiae*, and was permitted to present oral argument on the merits before the New York Court of Appeals. In toto, the Chamber sought permission to intervene *five* times — once before the Appellate Division; four times before the Court of Appeals. All such applications were denied.

ARGUMENT

The issues in the present case are uniquely narrow, and no amount of strained semantics can convert them into issues that this Court can or should review on certiorari. The initial question concerns the Chamber's "interest" in the case, an interest attenuated at best and in no event warranting intervention. The Chamber's "interest" is based upon the unsubstantiated assertion that granting welfare assistance may, in some manner, affect the collective bargaining process. This is

hardly the direct, substantial interest in the case warranting intervention. The Chamber, it is observed, neither pays nor receives welfare assistance.

The final question concerns review of the granting of welfare benefits to strikers. Since this Court originally denied certiorari on this issue in *ITT Lamp Div.* v. *Minter,* 402 U.S. 933 (1970) there has been no modification, no conflict of decisions, no important federal question raised with respect to this question. And the holding, that striking employees, where otherwise eligible, are entitled to receive welfare assistance is clearly correct. Therefore, there is no basis to review the decision below.

I

THE CHAMBER LACKS STANDING TO PETITION FOR A WRIT OF CERTIORARI.

A. This Court Lacks Power to Review the Denial of Party Status to the Chamber

Only a party to a case, or one improvidently denied party status, may seek review in this Court [*Automobile Workers* v. *Scofield,* 382 U.S. 205 (1965); *Railroad Trainmen* v. *Baltimore & O. R. Co.,* 331 U.S. 519 (1947)]. There are only two instances where denial of party status is subject to review: when intervention is a matter of right; when intervention is permissive and the denial is an abuse of discretion [*Railroad Trainmen* v. *Baltimore & O.R. Co., supra,* at 524-525].

The Chamber sought intervention in this case before the New York Appellate Division and Court of Appeals. By affidavits of Tracy H. Ferguson, dated November 23, 1971 and March 14, 1972, respectively, it is stated:

> "I make this affidavit in support of the Chamber's motion pursuant to CPLR Section 1013 . . ."

Section 1013 of the New York CPLR, substantively identical to Rule 24(b) of the Fed. R. Civ. Proc., provides for permissive intervention. Thus, the Chamber was denied intervention by permission, and not intervention "as of right."

As a result of the Chamber's erroneous implication that it applied for intervention as of right (Petition, p. 6), the Chamber does not assert that the denial of party status was an abuse of discretion. In any event, since the denial of its intervention was proper, and not an abuse of discretion, the Chamber is not a party to the case, and cannot petition for a writ of certiorari (*Automobile Workers* v. *Scofield, supra.*)

B. Denial of Party Status to the Chamber is Proper

1. Intervention as of Right

Although it has applied for intervention by permission in numerous cases, 2/ the Chamber now seemingly asserts, in this case, its intervention is suddenly a matter of right (Petition, p. 6). As to "intervention as of right," Rule 24(a) of the Fed. R. Civ. Proc. provides in relevant part:

> "Upon timely application anyone shall be permitted to intervene in an action . . .
> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action. . . ."

In *Hobson* v. *Hansen*, 11 FR Serv.2d 24a.2. Case 6, p. 680 (D.D.C. 1968) examining the nature of that "interest", the court stated:

> "[R]equired for intervention is a direct, substantial, legally protectable interest in the proceedings."

The Chamber, neither pays nor receives welfare assistance, and yet asserts an interest, claiming that such payments have an impact on the collective bargaining process. This interest is hardly the direct interest called for by the law, and instead depends on such factors as "how many states permit strikers to receive welfare; whether or not strikes tend to be of longer duration where welfare is received; . . . how many strikers

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2/ *See, e.g., Russo* v. *Kirby*, Civil No. 71-C-1237 (E.D.N.Y. November 16, 1972); *U. S. Chamber of Commerce* v. *Francis*, 41 U.S.L.W. 3043 (U.S. July 11, 1972), *appeal dismissed*, 41 U.S.L.W. 3199 (U.S. October 17, 1972); *Lascaris* v. *Wyman and Bugnacki, et al., supra.*

actually do receive welfare benefits; and a host of other factors" [*ITT Lamp Div.* v. *Minter*, 435 F.2d 989, 993 (1st Cir.) *cert. denied*, 402 U.S. 933 (1970)].

Numerous courts have found that the impact of welfare assistance on collective bargaining is "minimal at best," thus rejecting the substantiality requisite of the Chamber's "interest" [*Grinnell Corp.* v. *Hackett*, 475 F.2d 449, 458 (1st Cir. 1973) *pet. cert. pend.*, No. 72-1679; *ITT Lamp Div.* v. *Minter*, *supra*, at 994; *see, also, Lascaris* v. *Wyman and Bugnacki, et al.*, *supra*]. Finally, the fact that the Chamber has no "legally protectable interest in the proceedings" is graphically demonstrated by the decision in *Russo* v. *Kirby*, Civil No. 71-C-1237 (E.D.N.Y. November 16, 1971). On the Chamber's motion to intervene the court stated:

> "[T]he Chamber was not aggrieved by defendant Kirby's denial of welfare benefits to strikers and would not have been a proper original party to the action by Kirby . . . ."

The Chamber's veritable catalogue of cases where intervention was granted merely emphasizes its lack of interest in these proceedings. Those cases concern: intervention by competitors in anti-trust suits where divestiture was designed to restore competition; 3/ competitors in an administrative hearing where the outcome directly determined the prices of competitors and wages of employees; 4/ commissioner of state banks charged with enforcing state banking laws where the action concerned federal banking laws allegedly in conflict with the state laws; 5/ parties to a contract, wherein the contract was the subject of the suit; 6/ adjoining property owners whose right to intervene was

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3/ *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *Missouri-Kansas Pipeline Co.* v. *United States*, 312 U.S. 502 (1941) (Petition, p. 6).

4/ *Textile Workers* v. *Allendale Co.*, 226 F.2d 765 (D.C. Cir. 1955) (Petition, p. 6).

5/ *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967) (Petition, p. 6).

6/ *Pepsico, Inc.* v. *F.T.C.*, 472 F.2d 179 (2nd Cir. 1972) (Petition, p. 6).

statutory; 7/ persons for whose benefit the statute in question was enacted; 8/ and the holder of property possibly subject to inconsistent judgments.9/ Clearly, the Chamber's interest here is much less direct and insubstantial than the intervenors possessed in the above cases.

It is obvious why the Chamber has consistently sought intervention by permission. The Chamber does not possess the requisite interest in the controversy to warrant intervention as of right.

2. Intervention by Permission

In erroneously attempting to demonstrate that its intervention is a matter of right, the Chamber has instead demonstrated that it is not a proper party for permissive intervention. The Chamber states that it is "the only advocate of the federal position. . . ." (Petition, p. 7). To qualify for permissive intervention the applicant must assert a claim or defense having a common question of law or fact with the main action (Fed. R. Civ. Proc., Rule 24(b)(2); NYCPLR, §1013). Since the Chamber neither receives nor pays welfare there is clearly no common question of fact. As the "*only* advocate of the federal position" in this declaratory judgment action, it has not presented a common question of law.

Additionally, the Chamber has never submitted a pleading setting forth its claim or defense [*See*, Fed. R. Civ. Proc., Rule 24(c)]. Therefore, its application for intervention could not be granted [*See*, *Abramson* v. *Pennwood Investment Corp.*, 11 FR Serv. 2d 24c.13, Case 1, p. 718 (E.D.N.Y. 1967) *aff'd*. 11 FR Serv. 2d, 24c.13, Case 2 (2nd Cir. 1968)].

7/ *Wolpe* v. *Poretsky*, 144 F.2d 505 (D.C. Cir.) *cert. den.*, 323 U.S. 777 (1944) (Petition, p. 6).

8/ *New Orleans Water Works Co.* v. *New Orleans*, 164 U.S. 471 (1896) (Petition, p. 6).

9/ *Western Union Company* v. *Pennsylvania*, 368 U.S. 71 (1961) (Petition, p. 6-7).

Any allegation that the courts below abused their discretion in denying the Chamber's intervention has already been rejected by this Court. In *U.S. Chamber of Commerce* v. *Francis*, 41 U.S.L.W. 3199 (U.S. October 17, 1972) where the right of strikers to receive welfare assistance was presented, the Chamber appealed its denial of party status. In that case, addressing itself to whether the denial was an abuse of discretion, this Court held:

> "[P]etition by United States Chamber of Commerce to intervene in suit challenging Maryland rule, wherein Chamber was given opportunity both in written and oral argument to present its contentions, is denied, there being 'no reason to permit the same'. (Appeal Dismissed.)"

The Chamber, of course, presented its contentions, both in writing and orally before the New York Court of Appeals in this case.

The Chamber's assertion that it has been denied the "right" to obtain review in this matter (Petition, p. 8), begs the question. Since the Chamber does not, as demonstrated, *supra*, have the requisite interest to intervene, it has no "right" to seek review.

II

THERE IS NO CONFLICT OF DECISION.

Despite the Chamber's persistent attacks, the right of strikers to receive welfare assistance, where statutorily authorized, has uniformily been upheld [*See, Russo* v. *Kirby*, 335 F.Supp. 122 (E.D.N.Y.) *rev'd on other grounds*, 453 F.2d 548 (2nd Cir. 1971); *ITT Lamp Div.* v. *Minter*, 435 F.2d 989 (1st Cir.) *cert. denied*, 402 U.S. 933 (1970); *Lascaris* v. *Wyman and Bugnacki, et al., supra; Strat-O-Seal Mfg. Co.* v. *Scott*, 72 Ill. App.2d 480, 218 N.E.2d 227 (1966); *Cf., Francis* v. *Davidson*, 340 F.Supp. 351, *aff'd sub nom., Davidson* v. *Francis*, 41 U.S.L.W. 3199 (U.S. October 19, 1972), *appeal dismissed sub. nom., U.S. Chamber of Commerce* v. *Francis*, 41 U.S.L.W. 3199 (U.S. October 17, 1972); *Super Tire Engineering Co.* v. *McCorkle*, —F. Supp.— ( ) *vacated as moot*, 469 F.2d 911 (3rd Cir. 1972) *pet. cert. pend.*, 72-1554]. These courts have also consistently rejected the Chamber's contention that welfare payments to strikers are

prohibited because of their impact on the collective bargaining process.

The Chamber erroneously asserts that "substantial. . . dissension. . . has been engendered by the absence of a definitive determination [on this issue]" (Petition, p. 8). In facts, as demonstrated, *supra*, there is no such dissension. The Chamber's conclusion was apparently reached by its failure to distinguish between welfare assistance and unemployment compensation.

The only two cases cited indicating that the impact on collective bargaining may be worth investigation concerned unemployment compensation, and not welfare assistance [*See, Grinnell Corporation* v. *Hackett*, 475 F.2d 449 (1st Cir. 1973) *pet. cert. pend.*, No. 72-1679; *Dow Chemical Company* v. *Taylor*, No. 38664]. In *Grinnell Corporation* v. *Hackett*, *supra*, at 453, the court specifically noted this distinction stating:

> "[W]e are not able to determine whether the state interest in unemployment compensation is the same, or as substantial, as the state interest in welfare . . . ."

The court thus left its holding in *ITT Lamp Div.* v. *Minter*, *supra*, dealing with welfare assistance, unaltered. In *ITT Lamp Div.* v. *Minter*, *supra*, at 994, the court carefully distinguished welfare and unemployment benefits:

> "[W]elfare programs, supplying unmet subsistence to families without time limitation, address a more basic social need than does unemployment compensation . . . ."

This distinction, as observed, is integral to the relevant cases, and was duly followed in this case. The decision below, therefore, is consistent with all other cases concerning welfare assistance.

III

THE DECISION BELOW IS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

This case presented the narrow issue of the construction of Section 131 of the New York Social Services Law in light of a recent amendment to the said statute. That the decision was based solely upon state grounds is clear. The New York Court of Appeals, 31 N.Y.2d 386, 394-95, stated:

> "In any event, in light of this State's long-standing administrative policy sanctioning assistance payments to strikers, the Legislature, if it considers such a policy impermissible, should manifest its design in clear and unmistakable terms. Until such time as it does, we construe the statute as it stands and has been administered."

The court's reference to federal decisions was in no way connected to the interpretation of the state statute. The construction of a state statute is peculiarily a state matter [*See, Miller's Executors* v. *Swann*, 150 U.S. 132, 136 (1893); *Interstate Railway Co.* v. *Massachusetts*, 207 U.S. 79, 84 (1907); *Louisville & Nashville R. Co.* v. *Western Union Telegraph Co.*, 237 U.S. 300, 302 (1915)].

Since this decision is based upon adequate and independent state grounds, this Court lacks jurisdiction to review this case [*Murdock* v. *City of Memphis*, 87 U.S. 590 (1874)].

IV

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

The Chamber asserts that an important Federal question is presented by the payment of welfare assistance to strikers. Numerous courts have examined this contention and have uniformly held that it "lacks substance" [*Lascaris* v. *Wyman and Bugnacki, et al., supra*, at 396; *Russo* v. *Kirby, supra; ITT Lamp Div.* v. *Minter, supra; Francis* v. *Davidson, supra; Cf., Dandridge* v. *Williams*, 397 U.S. 471 (1970)].

The Chamber's assertion that welfare payments destroy governmental neutrality mandated by federal labor policy has been amply exploded. In the decision below, the Court of Appeals observed:

> "[I]t seems manifest that public assistance serves a purpose quite different from— and, by that token, not in conflict with— that which underlies the State's policy of neutrality." (*Lascaris* v. *Wyman and Bugnacki, et al., supra*, 31 N.Y.2d, at 394).

That purpose is to provide sustenance to needy individuals (id).

This Court has rejected the proposition that questions like those asserted by the Chamber are Federal questions warranting review by the courts. In *Dandridge* v. *Williams, supra*, at 487, this Court stated:

> "[T]he intractable economic social, and even philosophical problems presented by public welfare assistance are not the business of this Court. . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

The decision below was concerned with the interpretation of a state statute and was based upon state law. No Federal question, important or otherwise, was raised thereby.

V

THIS CASE IS PRESENTLY MOOT.

In February of 1972 the strike that precipitated this case was settled. Thus, since there is presently no case or controversy, this Court lacks jurisdiction to review the decision below [*See, Super Tire Engineering Company* v. *McCorkle*, 469 F.2d 911 (3rd Cir. 1972) *pet. cert. pend.*, No. 72-1554].

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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